UNITED STATES
vs.
R. W. BRUBAKER ET AL.

A-30636 Decided JUL 24 1956

Mining Claims: Common Varieties of Minerals

Whether deposits of stone within a mining claim are common varieties of stone no longer locatable under the mining laws since the act of July 23, 1955, or are locatable as an uncommon variety having a "distinct and special value", may be determined by ascertaining whether the deposit has some property making it useful for some purpose for which other commonly available materials cannot be used which gives it such value, or if used for the same purposes as minerals of common occurrence by determining if it has some property which gives it a special value for such use as reflected by the fact that the material commands a significantly higher price in the market place than the other materials.

Mining Claims: Common Varieties of Minerals

Where mining claims are located after July 23, 1955, for deposits of stone which are used for roofing granules and which may have physical or chemical characteristics superior for that purpose than other stone also used for the same purpose, the deposits cannot be considered to be uncommon varieties of stone which are subject to location unless their product commands a significantly higher price in the market place because of those characteristics than the other stone used for the same purpose.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A-30636

United States
vs.
R. W. Brubaker et al.

: Mineral Contests
: Riverside 02776, 02777,
: and 02778

: Mining claims declared
: void ab initio

: Set aside and remanded

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

R. W. Brubaker, B. A. Brubaker, and William J. Mann have appealed to the Secretary of Interior from a decision of the Chief, Office of Appeals and Hearings, Bureau of Land Management, dated April 11, 1966, which affirmed a hearing examiner's decision of July 10, 1964, declaring their placer mining claims involved in mineral contests Riverside 02776, 02777 and 02778 to be void ab initio on the ground that the materials within the claims are common varieties of stone not locatable under the mining laws since the enactment of the act of July 23, 1955, 30 U.S.C. § 601-615 (1964).

The contests were initiated by the Bureau of Land Management by complaints charging that the material within each claim is not a valuable mineral under section 3 of the act of July 23, 1955, 30 U.S.C. §611 1/, and also that valuable minerals have not been found within the limits of the claim so as to constitute a valid discovery within the meaning of the mining laws.

1/ This provision reads as follows:

> "A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. 'Common varieties' as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more."

The decision of the Office of Appeals and Hearings stated that four claims were declared void by the hearing examiner - the Nebocher, Near Pink, Orchid Slope No. 1 and Calico Shores. It pointed out that the parties had agreed at a pre-hearing conference that the Nebocher claim would be added to Contest No. 02776 and that the Goldview claim, which was the object of that contest, would be considered to be abandoned as to the contest with no evidence to be presented, and also that the contestees desired not to present any evidence regarding the Near Pink No. 2 claim listed in Contest No. 02778, which also listed the Orchid Slope No. 1 and the Calico Shores claims. The third contest, No. 02777, was against the Near Pink claim. It is not clear to us whether the parties intended to stipulate as to the invalidity of the Goldview and the Near Pink No. 2 claims or simply to drop them from the contests. The fact that the contestees "abandoned" the Goldview claim indicates that they thought it to be invalid. Their desire not to present evidence on the Near Pink No. 2 claim suggests the same. This is a matter that should be clarified in the further proceedings to be ordered in this case.

The claims are in a desert area near Barstow, California, and contain colored volcanic rock. All of the claims were located after the enactment of the act of July 23, 1955; therefore, the main issue as to their validity is whether or not they were located for a common variety of stone no longer locatable under the mining laws, or whether the deposit of stone on each claim "has some property giving it distinct and special value." Generally the evidence shows that materials from the claims are being crushed into various sizes and sold for roofing granules and to a much lesser extent for other decorative and building purposes. The examiner found that although the material on some of the claims may have an unusual color and certain physical properties which make it of a good quality for roofing purposes, and give appellants certain economic advantages over their competitors, it does not have a distinct special economic value for use over and above the normal uses of the general run of material used for such purposes. The Office of Appeals and Hearings concurred in the conclusion that it was therefore a common variety of material.

The examiner pointed out that the contestees could acquire the material under the provisions of the Materials Act of July 31, 1947, 30 U.S.C. 601 (1964), which authorizes the Secretary to dispose of sand and stone, in addition to other materials. Appellants contend that the examiner, "obsessed" with this fact, loses sight of the fact that they would have to bid for it and that if they spend large sums of money programming and developing a particular color, advertising it, furnishing samples and building up a demand for it, they would be constantly harassed with some competitor outbidding them for the source of their raw materials. This type of argument is not relevant to the issue involved. It would be better addressed to Congress than to those who

must apply the laws enacted by Congress, which establish the system by which these materials may be obtained from the public lands. For the examiner to point out that Congress has provided for the disposal of common varieties of materials by that act rather than the mining laws does not appear to be an "obsession", but simply an understanding of the statutory scheme as it relates to such materials.

Appellants also contend that the decision below is in error in holding that the rock in these deposits is used for the same purpose as other widely available and less desirable deposits of stone in the general area. However, appellants have failed to point out to what different purposes or uses the stone may be put that other stones in the general area may not be used for. The testimony of the Bureau's witness and appellants' witnesses showed that other materials - which may be less desirable because of their physical properties - are used for roofing granules and for other building purposes for which the stone from appellants' claims is used. Indeed the testimony indicated that common stone which is dyed to produce distinctive colors is used for roofing granules, although it was generally conceded that such material has its defects and is less desirable than the stone obtained from the claims in this proceeding.

The crucial issue raised by appellants is whether or not, as they contend, the decisions erred in holding that the rock on the claims has no special distinct economic value. They assert that the evidence was overwhelming that the stone does have physical and chemical properties which give it a distinct economic value. They point to the testimony of mining claimant Brubaker that he had prospected practically the entire desert area around Barstow, California, from the Cajon Pass to Death Valley, and rejected many deposits of stone because they did not have the proper physical, chemical or other characteristics necessary to make them satisfactory for his purposes. They also contend that his testimony and that of geology specialists who testified in his behalf is to the effect that the stone in the quarries on the claims has special distinct characteristics which give it an economic value different from that of other deposits in the general area.

Before considering the evidence in this case further, it will be helpful to define the criteria for determining whether a deposit of stone is of a common or uncommon variety, an uncommon variety being one stated in the act as having "some property giving it distinct and special value". Appellants have referred to a hearing examiner's decision in the case of United States v. U.S. Mineral Development Corp. The department's subsequent decision in that case, bearing the same title, 75 I.D. 127 (1968), pointed out that in determining whether a deposit has such a property giving it a distinct and special value there must necessarily be a comparison of the deposit with other deposits of similar type minerals. It indicated that if the stone or other mineral has some property making it useful for some purpose for which other

commonly available materials cannot be used, this may of itself adequately demonstrate that it has a distinct and special value. However, if the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it a special value for such use and that this value is reflected by the fact that the material commands a higher price in the market place. It is not enough merely to show that the material is marketable - a showing which must be made to demonstrate that there has been a discovery of a valuable mineral deposit of such materials - but, in addition, it must be shown that the market price is significantly greater than that for the common varieties of minerals used for the same purpose. See also United States v. Gene DeZan et al., A-30515(July 1, 1968).

This is the standard which must be applied. There is language in the hearing examiner's decision on page 8 which may be misleading as it appears to imply that stone used for roofing granules may never be an "uncommon variety" and that a use different from the normal uses of common varieties must be shown. To that extent the decision is in error.

As has been indicated, there is no evidence in this case that the material within the claims has some property making it useful for some purpose for which other commonly available materials cannot be used. It is apparent that other commonly available materials are used for roofing granules and for the other decorative and building purposes for which the material from these claims is used, although the quality of the other materials may not be as good for such purposes. See, e.g., the testimony of one of appellants' witnesses, an economic geologist (Tr. 122-123), and Brubaker's answers under cross-examination (Tr. 93-103), as well as the testimony of the Bureau's witness generally. The important inquiry then is whether or not the materials command a significantly higher price in the market place than other materials used for the same purposes.

Unfortunately, the evidence presented at the hearing relating to a comparison of market prices is not satisfactory. The Bureau's witness testified generally that the rocks have no value over other similar materials in the area except that perhaps some of the colored granules may receive a small premium on selling because their color is in favor at the time or it is a more attractive color (Tr. 38, 43). Contestee Brubaker described the marketing of materials from the claims (Tr. 69-71), and testified generally that he is able to compete with sellers of artificially colored rock and is able to outsell them and get "a higher price" although he is at a disadvantage on freight costs (Tr. 78). He stated that he sells his product in competition with other dealers in the area in natural stone and gets "a higher price"

for his (Tr. 82). Two geologists testified for the contestees, discussing the physical properties of the rocks within the claims and expressing their opinion generally that they have special economic value because of the unusual colors of the rock (Tr. 121, 130, 132, 135, 136). Brubaker considered other properties of the stone on his claims to give them greater value than rocks of his competitors having similar colors (Tr. 96-97). There was great stress that the stone on the claims is of volcanic origin. However, this fact is not significant if the properties attributable to that origin give the stone no greater economic value than other types of rocks and materials used for the same purposes.

The present record does not contain sufficiently detailed information upon which a comparison may be made of the economic value of the rocks within these claims with other stone used for the same purposes. The general statements of the witnesses at the hearing as to the economic value of the rocks were not supported by evidence showing differences in market prices between these rocks and other materials being used for the same purposes. Therefore, a further hearing in this case is needed to receive evidence on this issue of the comparative market place value of this stone with other materials used for the same purposes before a final decision can be made as to whether the deposits of stone within these claims are of an uncommon variety as defined under the act and the standard discussed above.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decisions appealed from are set aside and the case is remanded to the Bureau of Land Management for further evidentiary proceedings consistent with this decision.

Ernest F. Hom

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